Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1999

FISHING VESSEL OWNERS & MARINE WAYS, INC.,

Petitioners,

vs.

BANK OF AMERICA, NT & SA, formerly Seattle-First National Bank, fdba Seattle First National Bank aka Seafirst Bank, PENGWIN, Official No. 586183, KONRAD S. URI & I. HELEN URI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Should a lender be able to obtain lien priority through the judicially created "renewal" doctrine whereby a preferred vessel mortgage is not given priority based on its recording date, but rather the date of an earlier recorded preferred vessel mortgage?

B. Where a lien claimant has a perfected lien on a vessel, may a lender take two separate prior debts and after the date of the lien claimants perfected lien, later combine them with a series of ever increasing loans, and by consolidating all these separate prior and subsequent debts together and calling them "renewals", may the lender thereby defeat intervening lien claimants priority?

C. Did the United States court of appeals for the Ninth Circuit err in its application of the mortgage renewal rule when decided as a question of first impression to grant renewal status to a series of mortgages where the indebtedness was not the same as the original debt, the collateral was not the same as the original security, and the parties were not the same, as required by law and in contradiction to the well established precedent of the Fifth and Eleventh Circuits?

PARTIES TO THE PROCEEDINGS

A. Bank of America NT SA, formerly Seattle-First National Bank, fdba Seattle First National Bank, aka Seafirst Bank (Plaintiff and Appellee below. Bank of America is a publicly traded entity)

B. The vessel PENGWIN (in rem Defendant below).

C. Konrad Uri and Helen Uri (Defendants below)

D. Fishing Vessel Owners Marine Ways Inc (Intervenor-Appellant below. Fishing Vessel Owners Marine Ways Inc is a closely held Washington Corporation with no parent companies, subsidiaries, or affiliates that have issued shares to the public.)

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Appendix C - Statutes, Ordinances and Regulations 46 U.S.C. § 31321 et. seq 30a

Petitioner, Fishing Vessel Owners Marine Ways, Inc., respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit No. 97-36050 is reported at Bank of America, NT&SA v. Pengwin and Fishing Vessel Owners & Marine Ways, Inc., --- F.3rd --- (9th Cir. 1999) (App. A). The opinion of the district court in Bank of America, NT&SA v. Pengwin, Konrad S. Uri and I. Helen Uri, D.C. No. CV-96-01305-JCC is not published, but is attached hereto. (App. B).

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 14, 1999. (App. A).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS

46 U.S.C. §31321; 46 U.S.C. § 31322; 46 U.S.C. § 31325; 46 U.S.C. § 31342; 46 U.S.C. § 31343. (See App C)

STATEMENT OF THE CASE

In reforming the Ship Mortgage Act, Congress intended that the nature and extent of the obligation secured by the mortgage be plain from the face of the instrument so third parties would be on notice of the entire amount that is or may become secured by the mortgage. Now, under the judicially created doctrine of renewal, rather than an objective statutory analysis of lien priority, lenders and creditors must deal with subjective criteria "is it a renewal?" Vessel suppliers have no way of knowing. The doctrine of renewal contravenes the objective standard of the statute as well as Congress' intent and this case raises the issue of whether the doctrine of renewal retains any validity, especially following Congress' reformation of the Ship Mortgage Act.

This case also raises the fundamental question whether a lender is entitled to take multiple separate prior debts and later combine them with a series of ever increasing loans, and by consolidating all these separate prior and subsequent debts together and calling them "renewals", the lender can thereby defeat any prior lien claimants priority. The question arises in the context of the Fed. R. Civ. P. 56 motion of Bank of America NT&SA (hereinafter "Bank") for "partial" summary judgment to establish lien priority superior to Fishing Vessel Owners and Marine Ways, Inc. (hereinafter "FVO"). To establish lien priority, the Bank must establish that the multiple loans given on the vessel were renewals of a loan prior to the FVO lien. For renewal to exist the Bank must show the debt

is the same the security is the same, the parties are the same, so the junior lienor will be left in exactly the same position as if no renewal mortgage had been executed. See e.g. Avondale Shipyards v. Tank Barge, 754 F.2d 1300, 1306 (5th Cir. 1985). There must be no harm to the junior lienor. Not only were none of the elements of renewal cognizable, but the Ninth Circuit failed to recognize how allowing the lender to dramatically increase the debt and change the payout would prejudice intervening lien claimants. To allow the lender to significantly increase the debt and prevent payoff is precisely why the doctrine of renewal requires the same debt and why, until now, every decision by every other circuit has refused to recognize a mortgage renewal which purports to secure debt which is significantly greater than that outstanding at the time of renewal.

The district court had subject matter jurisdiction over Fishing Vessel Owners Complaint In Intervention pursuant to admiralty and maritime jurisdiction within the meaning of Fed. R. Civ. P. 9(h) and 46 U.S.C. § 31325. The district court's Orders confirming the sale of the vessel over objection, denying Fishing Vessel Owner's motion to compel and granting Bank of America's motion for summary judgment are final judgments, and the Ninth Circuit had jurisdiction over the subject matter of this appeal pursuant to 28 U.S.C. § 1291. To fully appreciate the significance of this case, it is essential to consider its factual underpinnings.

A. STATEMENT OF MATERIAL FACTS

This is an action to establish maritime lien claims and priorities against the vessel Pengwin. Appellant Fishing Vessel Owners (hereinafter "FVO"), is a small shipyard doing business at Fisherman's Terminal in Seattle. FVO did work on the vessel Pengwin in June of 1991 and is yet to be paid. To satisfy lien claims, on April 28, 1997, the Honorable John C. Coughenour ordered the vessel Pengwin sold by Marshall's sale. Following irregularities in the sale, FVO timely objected. The trial court confirmed the sale over FVO's objections. Bank of America NT&SA (formerly Seattle First National Bank), d/b/a Seafirst Bank, (hereinafter "Bank") moved for "Partial" Summary Judgment to establish lien priority superior to FVO. FVO responded and, on September 11, 1997, FVO moved to compel production of documents that the Bank acknowledged withholding and moved to compel answers to deposition questions that the Bank's counsel instructed the Bank's Vice-Presidents not to answer. On October 21, 1997, with no trial date or discovery cutoff in sight, the district court denied FVO's motion to compel holding, FVO had sufficient opportunity to discover information essential to defeat the Bank's motion. Regarding lien priority, the trial court found that so long as part of an original debt remains, a lender retains its priority in a series of subsequent loans notwithstanding ~~that~~ later loans are not denominated as renewals nor that they far exceed the original debt. The Court found the Bank's later mortgages nearly tripling the amount of debt which existed at the time FVO's lien arose retained their priority, and held that a new mortgage is presumed to be a

renewal even where the principal is increased. The court ruled, alternatively, since the amount of the Bank's lien seven years ago at the time FVO's lien arose exceeded the proceeds obtained at the Marshall's sale some seven years hence, FVO was not harmed; and, thus, the trial court granted the Bank's motion for summary judgment. Pursuant to Fed. R. App. P. 4(a)(1), FVO filed timely notice of appeal on November 12, 1997. The matter was argued before the Ninth Circuit on February 5, 1999 and the Court of Appeals issued their opinion on April 14, 1999.

1. FACTS CONCERNING FISHING VESSEL OWNERS LIEN PRIORITY

The Bank was foreclosing on a 1994 note and preferred vessel mortgage. FVO's lien for approximately $175,000 was perfected in June of 1991. To establish lien priority, the Bank had to establish that the various loans given on the vessel, ultimately resulting in a $2.8 million debt, were renewals of a loan prior to the FVO lien. The Bank's prior loan was a $300,000.00 loan perfected in 1990. Before that loan, the Bank also had made a loan in 1988 of $750,000.00. The 1988 loan for $735,000 called for a reduction in principal of $92,000 each year. The 1990 loan for $300,000 loan called for principal reductions of $60,000 each year. According to their terms, the amount of principal remaining at the time FVO's lien arose in June 1991 is $653,000. By their terms, the 1988 loan expired with a balloon due in November 1996 and

the 1990 loan expired in June of 1995. According to their terms, the amount of principal remaining at the time of the vessel sale in May 1997, should have been ***zero***.

The Bank purchased the vessel Pengwin at the Marshall's Sale for $575,000 yet claimed priority in all the proceeds. To prevail the Bank had to prove renewal.

After July of 1991 there were two subsequent mortgages made by the Bank. The July 1991 loan, which was recorded approximately one month after the FVO lien was perfected, had no mention that it is a renewal of a prior loan or loans. The Bank, in conjunction with the July 1991 loan, prepared a document entitled "Prior and Subsequent Liens Affidavit." The purpose of the Prior and Subsequent Liens Affidavit is to establish on July 3, 1991 (the date of the 1991 note and Preferred Vessel Mortgage) there were no prior liens or mortgages on the vessel Pengwin. The Affidavit prepared by Seattle First National Bank identified its first and second preferred vessel mortgages to SeaFirst as prior mortgages ahead of the 1991 Preferred Vessel Mortgage and note. If, in fact, the 1991 note and mortgage were intended to be a renewal or replacement, then the answer should have been "none". In fact, the subsequent mortgages after July 1991 do indicate "none" regarding prior liens. The July 1991 mortgage was different, it was treated as exactly what it was, ***a new loan***. The Bank could not provide an affidavit acknowledging the priority of its own prior loans ahead of its new loan and claim at the same time that it intended to renew the very same loans. The Bank's "refinance" trail stopped in 1991; FVO had

priority over the Bank, because its 1994 note and preferred vessel mortgage can go back no further than 1991.

The huge difference in principal between the amounts owed to the Bank prior to July 1991 and the new note and preferred vessel mortgage signed in July of 1991 were additional evidence the 1991 mortgage was a new loan and new mortgage.

REASONS FOR GRANTING THE WRIT

A. THE PETITION SHOULD BE GRANTED BECAUSE A PREFERRED VESSEL MORTGAGE SHOULD BE GIVEN PRIORITY BASED ON ITS RECORDING DATE RATHER THAN THE DATE OF AN EARLIER RECORDED PREFERRED VESSEL MORTGAGE

In the early days of the Union, the ship mortgage was not a useful financing tool since it was not a contract subject to foreclosure in admiralty. Bogart v. The John Jay, 58 U.S. (17 How.) 399, 15 L. Ed. 95 (1854). Initially, Congress enacted the Vessel Sales and Mortgage Recording Act which provided for the registration of ship mortgages; the Act provided that other maritime liens, including liens arising from repairs to the mortgaged vessel "shall not lose its priority, or be in any way affected by the provisions of this act." Act of July 29 1850, ch 27, 9 Stat. 440, codified at Revised Statutes

4192, et seq. at Section 1. For most of the history of the Union, since a ship mortgage was not a maritime contract within general maritime law and was not cognizable in admiralty, any valid maritime lien had priority over the mortgage lien. The J.E. Rumbell, 148 U.S. 1, 16, 13 S.Ct. 498, 501, 37 L. Ed. 345 (1893); Morse Drydock & Repair Co. v. S.S. Northern Star, 271 U.S. 552, 46 S.Ct. 589, 70 L.Ed.1082 (1926). Following the First World War, in an effort to attract private capital to sell the wartime fleet, Congress enacted the Ship Mortgage Act of 1920 which strove to create "a preferred mortgage which in foreclosure proceedings will have priority in the distribution of the proceeds from the sale of the mortgaged vessel over all maritime liens against the vessel except for damages arising out of tort. stevedores' and crews' wages, general average, and salvage." H.R. Rep. No. 1107, 66th Cong., 2d Sess. 31 (June 4, 1920). Congress required that preferred status was only available to a mortgage "when the mortgage is made." 46 U.S.C. § 922(a); (amended and reenacted as 46 U.S.C. § 31322(a)). In 1988, faced with a "confusing collection of individual statutes enacted over a period of nearly two centuries...[which]...are poorly organized, duplicative, often obsolete, and difficult to understand and apply", Congress sought to revise and recodify ship mortgage laws and enacted Public Law 100-710. H.R. Rep No. 100-918 at p.11, reprinted in 1988 U.S. Code Cong. & Admin News at 6108 et seq. These amendments took effect on January 1, 1989, after the Bank's initial loan of $735,000 at issue here. Congress' aim in

the legislation was threefold: to make mortgage and lien laws easier to administer, to make it less cumbersome for the maritime community to use and to make it more understandable for everyone involved. Id. The House Report is emphatic that no change from prior substantive law on lien priorities was intended except as to the mortgage attaining preferred status at the time of filing rather than at recording and endorsement. Id. at 15, 17-22; see Security Pacific Bank v. September Morn, 754 F. Supp. 813, 814 n.1 (W.D. Wash. 1990) (Congress intended no substantive change in maritime lien law).

The Statute sets out objective criteria for establishing lien priority. To be accepted and to qualify as a preferred mortgage, an instrument must identify the amount of the direct or contingent obligation that "***is or may become secured by the mortgage***." 46 U.S.C. § 31321(b)(3). In enacting the law, Congress principally intended to provide adequate notice to third parties of the nature and extent of the obligation. H.R. Rep No. 100-918 at p. 17. "One of the primary purposes of this chapter is to provide notice to third parties. If a third party can obtain adequate information on which to base a business decision, then the purpose has been met." Id. "When a mortgage secures an obligation and one or more advances or repayments may be made from time to time and the maximum outstanding under the obligation at any one time is limited to a certain amount, the amount to be recorded with respect to that obligation may be ***either the maximum amount that may be outstanding at any one time, or the total of all possible***

advances that may be made. However the filing must clearly indicate which method is being used." Id. at 18. Congress contemplated a mortgage could retain its priority and that advances could be made but only "under the commitment at the time the mortgage is recorded."

Nowhere did Congress ever intend to give carte blanche authority to the lender to dramatically increase loans, (in our case from three hundred thousand to two million eight hundred thousand) or consolidate loans, yet retain priority status under an old preferred vessel mortgage.

Yet the Federal Courts have judicially imported a doctrine of "renewal" which contradicts the objective criteria and notice provisions prerequisite to preferred status which filing and recordation are designed to provide. The renewal doctrine extends later mortgages the priority of earlier mortgages under a relation-back theory. To relieve the parties of the consequences which normally flow from release or satisfaction of the mortgage, the courts presume the parties entered the new mortgage to secure the original debt. Avondale Shipyards v. Tank Barge, 754 F.2d 1300, 1308 (5th Cir. 1985); Merchants and Marine Bank v Welles, 289 F.2d 188 (5th Cir. 1961); Barnouw vs. SS Ozark, 304 F.2d 717, 722-23 (5th Cir. 1962); Southern Reef Fisheries v. O/S Broadfire Leader, 786 F.2d 1523, 1524 (11th Cir. 1986).

Congress intended that the nature and extent of the obligation be plain from the face of the instrument so that third parties can make informed business decisions on whether to extend credit. If a mortgagor can increase or consolidate

loans and retain priority, intervening lien claimants surveying the record can never be sure of the actual amount of the obligation that is or may become secured by the mortgage, nor where there are multiple mortgages, can they tell to what extent a later mortgage renewed the prior. Rather than providing adequate notice, creditors such as FVO are set adrift to wonder "Is it a renewal or isn't it?" Cases relied on for renewal pre-date Congress' amendments. The doctrine of renewal contradicts the objective standard of the statute and the intent of Congress and should be abolished. Here, FVO made prudent inquiries and relied on the federal records as they had a right to do. More could not be expected of them. As discussed below, the Ninth Circuit has now rendered both the objective criteria of the federal statute and the doctrine of renewal meaningless by acknowledging renewal when none of the elements were present and by creating a new and previously unrecognized doctrine of partial renewal.

B. THE PETITION SHOULD BE GRANTED BECAUSE BY GRANTING PARTIAL PRIORITY AT LEAST TO THE EXTENT OF THE FACE AMOUNTS OF THE PRIOR MORTGAGES, THE NINTH CIRCUIT HAS AUTHORIZED LENDERS TO LEVERAGE THE DEBT TO PREVENT OLDER LOANS FROM EVER BEING PAID DOWN, A DEVASTATING CONSEQUENCE TO THE FISHING INDUSTRY.

The Ninth Circuit Court of Appeals acknowledged in its written decision that its decision was the first in that Circuit dealing with the issue of "renewal" of preferred vessel mortgages. The Ninth Circuit so broadly expanded the Fifth and Eleventh Circuit's doctrine of renewal, that the consequences for the entire fishing industry will prove devastating.

The renewal doctrine was first articulated in Merchants and Marine Bank v Welles, 289 F.2d 188 (5th Cir. 1961). In that case, the Court held that a new note and preferred vessel mortgage was considered to be a renewal of an older note and mortgage, giving the lender the superior lien priority of the older mortgage. The rationale of the Court was that the security was the same, the parties were the same, the debt was the same, so there was no harm to the junior lienor.

In the instant case, the lender was foreclosing on a 2.8 million dollar debt, the Vessel Pengwin was the collateral. Fishing Vessel Owners and Marine Ways Inc (FVO) is a small shipyard in Seattle, Washington. FVO had a maritime lien under 46 U.S.C. §31342 a lien that was clearly prior in time to the lender's preferred vessel mortgage. The lender claimed it's debt was a "renewal" of two prior mortgages, one for $735,000.00, the other for $300,000.00. Additional facts that were before the trial court were that the 2.8 million dollar debt had other additional collateral, a different vessel, and different parties, since the other vessel (Isafjord) did not have the same owners.

In affirming that the lender had lien priority over FVO,

the Ninth Circuit Court of Appeals created a new doctrine of law, best described as "partial renewal". The Ninth Circuit provided that the lender would have priority at least to the extent of the face amounts of the older mortgages. The impact of that doctrine on the fishing industry is enormous.

Under this new doctrine a lender can (and did in the instant case) lend large sums of money to a boat owner until the boat is so leveraged it will never be able to pay of the obligation to the lender. The lender, applying all of the income to interest on the new loans, never allows the older loans to be paid according to their terms, ultimately resulting in a foreclosure.

The fishing industry generally relies on credit. Ship repairs, supplies, and gear are typically provided on credit, based on the vessel's ability to produce income in the next fishing season. If a lender wishes to leverage a boat to an extreme level, they can certainly do so, but the lender should not be granted lien priority based on older mortgages that are a fraction of the total amount of the indebtedness. The Ninth Circuit's decision of partial lien priority will prove insidious in the industry, because the only remedy available to shipyards and small marine suppliers is to bid and pay cash on the vessel sale an amount equal to the older mortgages and the amount owed to the shipyard. While a few hundred thousand dollars is not significant to the lender, it is impossible for a shipyard to raise or commit those amounts of funds on vessels that are under foreclosure.

It is the belief that if the Ninth Circuit decision stands,

small maritime businesses will not be in a position to extend credit to the detriment of the vessel owners, and severely compromising the ability of a shipyard, such as FVO, to do business at all in the industry.

C. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE FIFTH AND ELEVENTH CIRCUIT RULINGS ON THE ESSENTIAL ELEMENTS OF THE MORTGAGE RENEWAL RULE; THE NINTH CIRCUIT ERRED IN ITS APPLICATION OF THE RULE WHEN IT DECIDED TO GRANT PRIORITY STATUS TO A SERIES OF MORTGAGES WHERE THE DEBT, THE COLLATERAL SECURING IT AND THE PARTIES WERE NOT THE SAME AS THOSE WHICH EXISTED AT THE TIME THE ORIGINAL LOAN WAS MADE .

In a devastating departure from the Fifth and Eleventh Circuit's established doctrine of renewal, the Ninth Circuit in a case of first impression found that a debt ultimately totaling 2.8 million dollars, was a renewal of several prior mortgages, where the debt outstanding at the time FVO's lien arose was only one third of this amount. The debt was not the same; the security was not the same (the loan was secured by another vessel); and the parties were not the same (the other vessel had different owners). Not only were none of the elements of

renewal cognizable, but, the Ninth Circuit failed to recognize how allowing the lender to dramatically increase the debt and change the payout would prejudice intervening lien claimants. If a mortgage renewal purports to secure an indebtedness greater than that outstanding at the time of the renewal, the interests of intervening lien claimants are prejudiced precisely because the principal of the old debt now goes unpaid and the intermediate creditors who would have been paid now get nothing.

> "While these points have force and might well lead to a different result in a different case, we do not see how they can make any difference in this case since the outstanding principal amount of the June 1988 and September 1990 mortgages substantially exceeded the proceeds from the sale of the vessel. ***Whatever the import of increasing the debt or changing the payout, the fact remains that the old debt was still unpaid and,*** like the lien claimants in Southern Reef Fisheries, 786 F.2d at 1525, Barnouw, 304 F.2d at 723, and CIT Corp. v. M/V Winchester, 643 F.Supp. 1059, 1064 (E.D. Va. 1986), ***FVO would not have had priority in these proceeds in any event.***"

(App. A; Opinion at 3419-20).

The Court held because the prior debt was not paid down FVO was not prejudiced. However the court neglected the very fact that by allowing the lender to increase the debt and change the payout, the lender is able to ***prevent the old debt from ever being paid down and therefore prevent***

intermediate creditors from ever being paid. This is precisely why the doctrine of renewal requires the same debt and why, until now, every decision by every other circuit has refused to recognize a mortgage renewal which purports to secure debt which is significantly greater than that outstanding at the time of renewal.

Central to each prior decision granting priority to the party claiming renewal is the fact that the intervening lien claimants must be left in exactly the same position as they would have been if no renewal mortgages been executed. Compare Avondale Shipyards v. Tank Barge, 754 F.2d 1300, 1305-09 (5th Cir. 1985). Avondale collected and summarized prior maritime cases on this issue and explained that their prior decisions including Barnouw expressly left undecided the issue of the treatment to be afforded a mortgage renewal which since it purports to secure an indebtedness ***greater than that outstanding at the time of the renewal, or for some other reason prejudices the interests of the intervening claim***. Id. at 1306 (emphasis supplied).

A central premise of the Banks argument is that each new indebtedness is a "renewal" and it is thus entitled to priority notwithstanding the fact the mortgage "renewals" it claims purport to secure an indebtedness far ***greater than that outstanding at the time of the renewal***. The Bank's assertion is as directly contradictory to any factual determination of renewal as it is contrary to a legal or equitable determination they are entitled to priority. Thus, summary judgment was manifestly improper.

The court erred by affirming renewal where the debt, collateral and parties were not the same. In essence, the Ninth Circuit has rendered the doctrine of renewal nugatory. Further, by affirming renewal in the face of a debt which tripled the original, the court has created a dangerous departure from the doctrine which authorizes lenders to leverage the debt to prevent other creditors from being paid.

1. BY ALLOWING CONSOLIDATION AND INCREASE IN DEBT, THE NINTH CIRCUIT GRANTED PRIORITY IN EXCESS OF THE ORIGINAL DEBT REMAINING AT THE TIME OF THE SUBSEQUENT RENEWAL.

For a renewal to exist, the law requires that there be the same indebtedness, the same security, and the same parties. Avondale Shipyards v. Tank Barge, 754 F.2d 1300, 1306 (5th Cir. 1985).

In affirming the district court, the Ninth Circuit created two new doctrines regarding renewals that simply do not exist in Federal or State law. The district court held first, that the Bank could consolidate the 1988 mortgage, and the 1990 mortgage and then give priority back to 1988. (App B). Secondly the district court ruled that since the Bank bid only $575,000.00 at the time of the sale, and that the consolidated amounts of the loans in existence at the time of the FVO lien exceeded that amount, the Court considered that amount a

renewal. (App B). No case in existence suggests partial priority of a mortgage based on the renewal doctrine. The Courts have always held that a new preferred vessel mortgage is either a renewal, or it is not a renewal. There is no doctrine of partial renewal.

Neither the renewal doctrine relied on by the Bank, nor the objective standard Congress set out in the maritime lien statute was ever intended to give carte blanche authority to the lender to dramatically increase loans, (in our case from three hundred thousand to two million eight hundred thousand) or consolidate loans, yet retain priority status under an old preferred vessel mortgage.

A. The Bank Could not Rely on the Doctrine of Renewal to Obtain Lien Priority over FVO's Lien.

The Bank relied in its motion for summary judgement on Merchants and Marine Bank vs. Welles, 289 F.2d 188 (1961). That case held that a new note and preferred vessel mortgage was considered to be a renewal and the mortgage holder retained its lien status. Id. at 194. The court explained that in attributing to the renewal mortgage, the priority of the initial mortgage, the junior lienor is left in "exactly the same position" as they had been if no renewal mortgage had been executed. Id. (emphasis supplied). Consequently, there was no harm to the junior lienor. Id. In examining the facts of their case, the Court articulated "the security was the same,

the parties were the same, the debt was substantially the same." Id. at 193. In that case the original note was for $12,000.00, the renewal note was for $11,500.00.

In other cases in which the new mortgage is considered a renewal, the Courts have consistently determined that the original loan and the renewal loan are substantially the same. In Avondale Shipyards vs. Tank Barge, 754 F.2d 1300, 1306-08 (5th Cir. 1985), the renewal amount was a refinance of the remaining balance on the original note and Preferred Vessel Mortgage. In Barnouw vs. SS Ozark, 304 F.2d 717, 722-23 (5th Cir. 1962) the principal balance was substantially the same. In that case there was a small increase in the principal balance to offset the debtor being given a lower interest rate. Id. In other words, the debtor paid a point on the loan in order to buy down the interest rate. The court noted that was a common financing transaction and observed that the principal balance was substantially the same as that of the original debt. Id.

Whether you look at the original principal balance of the 1988 note ($735,000.00) the remaining principal balance as of July 1991 on that note ($459,000.00), or the $300,000.00 note and mortgage recorded in September, 1990, the fact of the matter is that the July 1991 note for $1,400,000.00 ***could not conceivably be considered to be,*** in the words of the Merchants and Marine Bank decision, ***"substantially the same" as the original debt***. Merchants and Marine, supra 289 F.2d at 193. That the Bank's Complaint was ultimately for $2,800,000.00, many times the original

indebtedness, that the loan was secured by different collateral (the bank cross-collateralized the loan with another vessel) and different parties (the vessel was owned by another corporation) makes FVO's argument that the court erred in granting renewal all the stronger.

2. THE PETITION SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT DECISION CONFLICTS WITH THE CONSISTENT DETERMINATION OF OTHER FEDERAL COURTS THAT UNDERCAPITALIZATION PREVENTS TREATMENT OF A NEW MORTGAGE AS A RENEWAL

In opposition to the Bank's motion for summary judgement, FVO also argued that there were further compelling equitable arguments that support FVO's position. Going back to the case of Merchants and Marine Bank vs. Welles, 289 F.2d 188 (1961), the Court enunciated the rule that given the equivalent principal balance, security, and parties, the Court would treat a new mortgage as simply a renewal, it indicates that it would only do so "in the absence of paramount equities." The Federal courts have consistently held that in examining inequitable conduct by a preferred vessel mortgage holder, the courts will consider under-capitalization as precluding treatment of a new note and preferred vessel mortgage as a renewal. 2 Benedicts on

Admiralty, Chapter 6 § 70G (1994). The Bank has filed affidavits in this case maintaining that the sale price of the vessel and fishing rights ($575,000.00) is a proper figure. When the Bank dramatically increases a loan in the amount of $735,000.00 to a debt obligation of $2,800,000.00 on a boat they affirm is only worth $575,000, no sufficient equity or capital exist to cover the obligations imposed upon this vessel. Granting renewal under such circumstances is plain error.

B. The Mortgage Prior to The FVO Lien Was For Only $300,000.00

The Trial Court ruled that the Bank obtained priority in part because the amount of the Bank's bid at the foreclosure sale was less than the amount owed the Bank at the time FVO's lien was in place. (App. B). However, the fact that the Bank loan prior the FVO loan was for only $300,000.00 defeats the trial Court's analysis.

The Bank's theory on their Motion for Summary Judgment was that each note executed in favor of the Bank and each preferred vessel mortgage was merely a renewal of the previous note and mortgage. In the Bank's original complaint they failed to even mention the fact that in September of 1990, a $300,000.00 note and mortgage was executed in favor of the Bank. After that issue was raised by FVO, the Plaintiff amended their complaint to include the $300,000.00 mortgage.

The Bank's theory that each note was a renewal of the

previous is difficult to understand if there is a May, 1988 $735,000.00 note, then a September, 1990 $300,000.00 note, then in July, 1991 $1,400,000.00 note. Under the Bank's theory, the $300,000.00 note would have been a renewal of the $735,000.00 note, and then in July of 1991, the $1,400,000.00 note was a renewal of the $300,000.00 note, making the difference in principal even more disparate than originally contemplated.

Although it acknowledged FVO's arguments that the Bank is not entitled to renewal since the collateral was difference (in addition to the PENGWIN the bank added the ISAFJORD as security for the later increased loan amounts), the debt was not substantially the same, the Ninth Circuit failed to see what difference it made to allow renewal or consolidation of the loans since the outstanding principal amount substantially exceeded the proceeds from the sale and thus the court concluded FVO would not have had priority in the proceeds anyhow. (App. A, Opinion at 3419-20). First it makes all the difference in the world; and second, the court's conclusion is incorrect. If a lender is allowed to entirely rearrange the amount, collateral securing the loan, the parties and the payout, then renewal means nothing. Second, absent consolidation and renewal, the prior loans would be treated as separate obligations and, by their terms, would have been paid off years earlier.

Facially, the September 1990 $300,000 debt is not a renewal; and the July 1991 debt of $1.4 million cannot be a renewal of the $300,000 debt. After 1990, no amount in

excess of $300,000 could be a renewal. The September 1990 note for $300,000 states on its face:

> "LINE OF CREDIT: This loan is a straight line of credit. Once the total amount of principal has been advanced, Borrower is not entitled to further loan advances."

This evidence controverts the Bank's assertion of intent to renew as well as assertions regarding payoff figures for the loans.

Every renewal case cited by the Bank in its motion for summary judgement involves renewal of the prior note and preferred vessel mortgage. There is no case in existence, to FVO's knowledge, that suggests the Bank may obtain renewal status on everything that is owed to it at any time on any note; nor are there cases that suggest the Bank can consolidate all its loans under one refinance, and then get lien priority based on the oldest preferred vessel mortgage. At best, the Bank can try to claim the July 1991 mortgage was a refinance of the prior mortgage, which is the $300,000.00 mortgage obligation. To do so, defeats even the Trial Court's interpretation of the renewal doctrine, since now the sale price of the vessel $575,000.00 exceeds the prior mortgage $300,000.00.

Even assuming the truth of the Bank's argument, they cannot show renewal. The Bank's Vice President asserts that "[T]he balance on the promissory notes of May 19, 1988 and September 6, 1990 was paid down to $745,144.77 before additional credit was extended to Pengwin, Inc. on June 19,

1991. This was the lowest balance for the two notes at any time"

If true, then as of June 1991, no loan amount substantially in excess of $745,144.77 can be considered a renewal. On June 19, 1991 the Bank extended additional credit in the amount of $1.4 million, twice the balance remaining on the prior debt. Putting aside the fact that the Bank withheld significant portions of its loan file and FVO brought a motion to compel, there is nonetheless no need to adduce any additional evidence regarding the Bank's calculation of the pre-July 1991 debt since as a matter of law a loan of 1.4 million is not a "renewal" of a $745,000 debt.

Even assuming the truth of the Court's opinion that all they are doing is granting the Bank priority only to the extent of the balance outstanding when FVO perfected it lien, the court's assertion that FVO is not harmed by granting such partial priority is fallacious since the Court's opinion rests on the premise that between June of 1991 and the time the Bank foreclosed in August 1996 , a period of over five years, would not be paid down.

The loan purporting to renew the $745,144.77 balance outstanding when FVO perfected it lien called for semi-annual reductions in principal of $87,500.00 beginning January 1, 1992. By the time the Bank foreclosed in 1996, ten payments totaling $875,000.00 were called for and subsequent "renewals" called for even greater reductions in principal. If, in fact, the court only granted partial priority to the extent of the 1991 $745,144.77 balance outstanding when FVO

perfected it lien, then FVO is entitled to every last dime from the sale since the prior debt would have been completely paid off by the time of the sale. To find such "partial" renewal in the face of ever increasing debt and ignore the prejudice that accrues, is in direct conflict with prior federal law and renders the doctrine of renewal a dead letter.

CONCLUSION

This case presents a question of exceptional importance. The Bank obtained fishing rights and a vessel worth millions of dollars for a credit bid of only $575,000.00. From the proceeds of the sale FVO will receive nothing. The trial court ruled FVO receives nothing because the two million eight hundred thousand mortgage the Bank was foreclosing on was a "renewal" of two existing loans which had a principal balance of approximately $745,000.00 at the time of FVO's lien. The Court reached that result by consolidating the two loans and giving partial priority up to the amount of the debt existing at the time of FVO's lien, despite there being no case law or statute which creates those rules. Lenders must not be permitted to consolidate all prior and subsequent debts and by calling them "renewals" defeat any prior lien claimants priority. Each of the Trial Court's rulings about lien priority, and the Ninth Circuit's ruling are contrary to the well established case law, and should be reversed. Accordingly, Fishing Vessel Owners Marine Ways, Inc. respectfully requests this Court to grant its petition for a writ of certiorari.

Respectfully submitted

/s/_____

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Supreme Court, U.S.

NO. 99 78 JUL 8 - 1999

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1999

FISHING VESSEL OWNERS & MARINE WAYS, INC.,

Petitioners,

vs.

BANK OF AMERICA, NT & SA, formerly Seattle-First National Bank, fdba Seattle First National Bank aka Seafirst Bank, PENGWIN, Official No. 586183, KONRAD S. URI & I. HELEN URI,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDIX TO PETITION

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APPENDIX

A. OPINIONS, ORDERS, FINDINGS OF FACT AND CONCLUSIONS OF LAW

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BANK OF AMERICA, NT&SA,
formerly Seattle-First National
Bank, fdba Seattle First National
Bank, aka Seafirst Bank,
Plaintiff-Appellee,

No. 97-36050

v.

D.C. No.

PENGWIN, Official No. 586183,
CV-96-01305-JCC
Defendant,

OPINION

and

FISHING VESSEL OWNERS & MARINE
WAYS, INC.,
Intervenor-Appellant.

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted
February 5, 1999--Seattle, Washington

Filed April 14, 1999

Before: Pamela Ann Rymer and Andrew J. Kleinfeld, Circuit Judges, and Jeffrey T. Miller,* District Judge.

Opinion by Judge Rymer

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*Honorable Jeffrey T. Miller, United States District Court Judge for the
Southern District of California, sitting by designation.

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SUMMARY

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COUNSEL

Gregory J. Lawless, The Lawless Partnership, Seattle, Washington, for the intervenor-appellant.

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John E. Casperson (argued) and Christopher Y. Kim, Holmes Weddle & Barcott, Seattle, Washington, for the plaintiff-appellee.

OPINION

RYMER, Circuit Judge:

In this appeal we are asked to resolve the priority of various maritime liens against the vessel PENGWIN. Seattle-First National Bank ("Bank")1 caused the vessel to be arrested, and the PENGWIN, together with its fishing rights, were sold at a marshal's auction May 7, 1997. Fishing Vessel Owners & Marine Ways, Inc. ("FVO") intervened. The district court confirmed the sale and determined that the Bank, which had recorded two preferred ship mortgages before FVO had completed work on the vessel that gave rise to a necessaries lien, as well as a series of mortgages thereafter, had priority to the extent of the outstanding balance on the indebtedness secured by both of the earlier mortgages as of the time FVO's lien arose. The main issues presented by FVO's appeal are whether the two earlier mortgages should have been consolidated and treated as replaced and renewed, and whether partial priority should have been accorded the outstanding balance on those mortgages in the face of subsequent mort- gages that substantially exceeded the amount of the prior indebtedness. We conclude that the mortgages recorded before the necessaries lien arose were not extinguished and therefore take priority at least to the extent that they remained unpaid when FVO's lien was perfected. As the district court did not otherwise err, we affirm.

1 Seattle-First National Bank (dba SeaFirst Bank) is now Bank of America, NT&SA.

I

The transactions relevant to our decision are as follows:

- June 23, 1988: The Bank recorded a mortgage on the PENGWIN securing a promissory note for $735,000 with interest at 1.75 over prime and semi-annual principal payments of $46,000 until November 1, 1996, when the unpaid balance was due and payable.

- September 20, 1990: The Bank recorded a mortgage on the PENGWIN securing a promissory note for $300,000 with interest at 1.75 over prime and semi-annual payments of principal of $30,000 until June 30, 1995, when the unpaid balance was due and payable. The "Prior and Subsequent Liens Affidavit" notes a first PMM in favor of the Bank for $735,000.

- June 26, 1991: FVO completed work on the PENGWIN, giving rise to a $148,208.85 necessaries lien.

- July 10, 1991: The Bank recorded a mortgage on the PENGWIN securing a promissory note for $1,400,000 with interest at 1.675 over prime and

semi-annual payments of principal of $87,500 until July 1, 1999, when the unpaid balance was due and payable. The "Prior and Subsequent Liens Affidavit" notes a first PMM in favor of the Bank for $735,000 and a second PMM for $300,000.

- December 30, 1991: The Bank recorded a mortgage on the PENGWIN securing a promissory note for $1,900,000. The "Prior and Subsequent Liens Affidavit" notes no prior mortgages.

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- December 22, 1994: The Bank recorded a mortgage on the PENGWIN securing the debt of Isafjord Fishing Company for $1,150,000. Its "Prior and Subsequent Liens Affidavit" notes a first PMM in favor of the Bank.

- December 30, 1994: The Bank recorded an"Amendment to Preferred Mortgage" of December 30, 1991, changing the amount to $1,733,750 and securing a new promissory note. The "Prior and Subsequent Liens Affidavit" notes no prior mortgages.

- May 7, 1997: The PENGWIN was sold by the Marshal to the Bank for $575,000.

Meanwhile, on August 21, 1996, the Bank filed a complaint seeking to foreclose on the December 30, 1991 mortgage (for $1,900,000.00, with a balance of $1,741,607.27) and the December 22, 1994 mortgage (for $1,150,000 with a balance of $1,080,339.97). The First Amended Complaint alleges that

the December 1991 mortgage was a renewal of and replacement for the promissory notes secured by the July 1991 mortgage (for $1,400,000), which in turn was a renewal and replacement of the June 1988 mortgage for $735,000 and the September 1990 mortgage for $300,000. FVO intervened to assert a maritime lien for necessaries in the amount of $148,208.85. The district court entered an order directing the United States Marshal to conduct a sale of the PENGWIN and its fishing rights to satisfy lien claims. Notice of the sale was published for six days prior to the sale as required by Local Admiralty Rule 145(a). FVO objected to confirmation because the notice did not correctly identify the vessel's location or indicate that fishing rights were included, and because the sale resulted in an inadequate price. The district court confirmed the sale on May 29, 1997.

The Bank then moved for summary judgment to establish the priority of its claim over FVO, which the district court

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granted. The court acknowledged the general rule that in the absence of a clear indication of contrary intent, execution of a new mortgage in renewal of a former one does not extinguish priority of the former one, and that as long as a portion of the principal debt remains, the new mortgage is presumed to be a renewal regarding the same security. See Southern Reef Fisheries v. O/S Broadfire Leader, 786 F.2d 1523, 1524 (11th Cir. 1986). The court also recognized that this rule (sometimes referred to as the "mortgage renewal " rule) only applies to the extent of the amount of the remaining debt at the time of renewal. See Merchants & Marine Bank v. The Fishing Vessel T.E. Welles, 289 F.2d 188, 194 (5th Cir.

1961). Given the Bank's evidence that the lien balances on the June 1988 and September 1990 mortgages were never less than $745,144.77 in total, and that this remaining $745,144.77 lien had never been extinguished, the court rejected FVO's argument that the July 1991 mortgage was new and destroyed the Bank's priority on the June 1988 and September 1990 mortgages. The court also rejected FVO's contention that the June 1988 and September 1990 liens were separate mortgages and the remainder on each was less than the amount of the vessel proceeds, as FVO provided no evidence that separating the liens would affect their total value. Finally, the court concluded that FVO would not be left in a worse position under the mortgage renewal rule because the amount of the Bank's lien in June 1991, when FVO perfected its lien, exceeded the total of the sale proceeds.

After the Bank's motion for summary judgment was noticed, FVO moved to compel discovery and argued that summary judgment should be denied until discovery was completed. The district court found the circumstances did not come within Rule 56(f) given the time that had elapsed since FVO first raised the issues that were covered by the discovery request.

FVO has timely appealed each of these rulings.

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II

[1] A mortgage that complies with the requirements of 46 U.S.C. S 31322(a)(1)--as each of the Bank's mortgages do in

this case--is a "preferred" mortgage that has priority over all claims against a vessel except for expenses allowed by the court and preferred maritime liens. See 46 U.S.C. S 31326(b)(1). Preferred maritime liens are those arising before a preferred mortgage is filed, or for tort damages, wages, general average, and salvage. See 46 U.S.C. S 31301(5). FVO's lien arose on account of labor, parts and materials and so is not a preferred maritime lien with respect to the Bank's July 1988 and September 1990 preferred ship mortgages. As a result, those mortgages have priority over FVO's lien, unless they were extinguished.

The Bank foreclosed on the theory that the December 1991 mortgage renewed and replaced the July 1991 mortgage, which in turn had renewed and replaced the September 1990 and July 1998 mortgages that were prior to FVO's lien. Its position is that the unpaid balance on the September 1990 and July 1998 mortgages--$745,144.77--carried forward with each renewal. As that debt was never paid, the Bank claims the same priority for that amount as it had at the time FVO's lien arose.

FVO contends that the series of mortgages recorded after its lien was perfected did not renew the June 1988 or September 1990 mortgages. The heart of its case is that the renewal rule cannot apply unless the debt is the same, and here it wasn't because the Bank increased the amount of indebtedness from $300,000 to $2,800,000.2 FVO argues that allowing

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2 FVO's argument refers at different times to different mortgages and to different numbers. For example, sometimes it compares the $2.8 million of aggregate mortgages existing as of December 1994 with the September 1990 mortgage for

$300,000. Its position in the district court was that the September 1990 mortgage, being closest in time to its necessaries lien, is

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the Bank to retain the priority status of the old preferred ship mortgages, even to the amount of the outstanding balance, puts FVO in a worse position since the additional debt permits the Bank to leapfrog over the payments which would otherwise have been used to retire the original debt.

The "mortgage renewal rule," which neither the Bank nor FVO challenges except in application, is well established in the Fifth and Eleventh Circuits, but has not previously been addressed in the Ninth Circuit.3 As first articulated in The T.E. Welles,

> [t]he accepted rule is that unless a contrary intention of the parties clearly appears, the execution and delivery of a new mortgage in renewal of a former one, even though accompanied by a formal satisfaction and discharge of the initial mortgage, does not have the effect of extinguishing the priority which the initial mortgage carries. The subsequent mortgage given in renewal is prior to liens which arose or would otherwise have come into being during the period of the initial mortgage.

The T.E. Welles, 289 F.2d at 194.4 In The T.E. Welles, a pre-

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the operative "prior" preferred ship mortgage, an argument

that it repeats here. As we shall explain, we disagree that only that lien counts. At other times, FVO uses the July 1991 mortgage securing a $1.4 million note for comparison purposes. FVO also relies on the original principal balance of the June 1988 note of $735,000, and sometimes on $459,000, which would have been the remaining principal balance as of July 1991 on the June 1988 note if it had been paid down in accordance with its terms. 3 We recognized a similar rule in The Bergen, 64 F.2d 877, 880-81 (9th Cir. 1933), upon which The T.E. Welles relied in part, that a discharge by the mortgagee of his lien and the surrender of it to the mortgagor in consideration of a conveyance of the mortgagor's interests to the mortgagee does not extinguish the lien as against junior or intermediate encumbrances, but rather, the senior lien still retains its priority. 4 Although not frequently discussed in reported cases, the rule has been recognized and applied by a number of courts. See, e.g., Soūthern Reef

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ferred ship mortgage was recorded to secure a note for $12,000; when its balance was $7,771.50, the Bank agreed to loan an additional $4,000 for which the vessel owners executed a new note for $11,500. A new preferred ship mortgage for that amount was executed, and a satisfaction of the initial mortgage was filed along with the new mortgage. As the court observed, the security and the parties were the same, and the debt was substantially the same. Meanwhile, a lien for supplies had arisen. In those circumstances, the court held that "where the holder of a senior mortgage discharges it of record, and contemporaneously therewith takes a new mortgage, he will not, in the absence of paramount equities, be held to have subordinated his security to an intervening lien

unless the circumstances of the transaction indicate this to have been his intention." Id. at 194 (internal quotations omitted).

The Fifth Circuit revisited the renewal rule in Barnouw v. The S.S. Ozark, 304 F.2d 717 (5th Cir. 1962), and Avondale Shipyards, Inc. v. Tank Barge ETS 2303, 754 F.2d 1300 (5th Cir. 1985). In Barnouw, a balance of $360,000 on an earlier debt of $500,000 secured by a ship mortgage was refinanced to $410,000, secured by a new preferred mortgage which did not refer to the former mortgage, on which a satisfaction was recorded. The court noted that at the time of the rearrangement, the debt was $360,000 and to this extent, there was no advance of new credit or cash. Further,

[w]hatever the consequence of the increase in the debt, or the change in the interest rate, it is uncontra-

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Fisheries, 786 F.2d at 1524; Avondale Shipyards, Inc. v. Tank Barge ETS 2303, 754 F.2d 1300, 1305-10 (5th Cir. 1985); Barnouw v. The S.S. Ozark, 304 F.2d 717, 722 (5th Cir. 1962); C.I.T. Corp. v. M/V Winchester, 643 F.Supp. 1059, 1062-64 (E.D. Va. 1986); Southwest Wash. Prod. Credit Ass'n v. O/S New San Joseph, 1977 AMC 1123, 1125-26 (N.D. Cal. 1977); Coastal Dry Dock & Repair Corp. v. The S.S. Baybelle, 1975 AMC 1736, 1754-55 (S.D.N.Y. 1975); Marine Mart, Inc. v. The O/S Miss Darla Dawn, 273 F.Supp. 353, 357 (S.D. Tex. 1967).

dicted that for an amount way in excess of the

> proceeds from the Marshal's sale of the vessel, the former debt continued unpaid. This brings into play the proposition that "so long as the same debt, or some part of it, subsists, the presumption ordinarily is that the new mortgage is intended as a renewal of the old, and the continuance of the same security."

Barnouw, 304 F.2d at 723 (citations omitted). The result was that the later mortgage carried with it the former mortgages to the extent of the original debt remaining at the time of the implied renewal.

[2] In Avondale Shipyards, the issue was whether the parties had to be identical in order to grant a renewal mortgage the priority of a discharged mortgage for which it had been substituted. The court concluded that a change in mortgagors did not necessarily preclude application of the mortgage renewal rule, but in so holding, it had occasion to survey the authorities and to discuss the rule in some detail. As it explained:

> [T]he rule is an equitable one designed to accommodate two basic security principles. The first principle is that, when one acquires a lien on property already encumbered by a mortgage, he does so subject to the possibility, because of rearrangements or renewals of the indebtedness, that the lien of the mortgage may be extended beyond the original maturity date or that the terms of the indebtedness may otherwise change. In other words, indebtedness may be extended, renewed, or rearranged without necessarily releasing the lien of a mortgage by which it is secured. The second principle is that a recorded

> satisfaction or dis charge generally releases a mortgage lien. This usually takes place, of course, in connection with payment of the underlying indebtedness. The renewal mortgage rule operates when the parties
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> intend to avail themselves of the first principle but, at the same time, take action which invokes the second principle. When parties who intend simply to renew or rearrange a debt that has not actually been paid release an existing mortgage and, at the same time, record a new mortgage by which they intend to extend the lien of the prior mortgage, they should be granted relief from the consequences that normally flow from the release or satisfaction of a mortgage if intervening liens and claims are left in no worse a position than they would have occupied if the parties had properly structured the renewal or rearrangement of the debt. Thus, the rule provides equitable relief from the mistake of recording a satisfaction or dis charge of a mortgage to parties who did not intend to release the lien.

Avondale Shipyards, 754 F.2d at 1308 (citations omitted).

FVO maintains that the district court improperly extended this rule in two respects: by holding that the Bank could consolidate the 1988 mortgage and the 1990 mortgage and then relate back the priority to 1988, and by ruling that since the Bank bid only $575,000 at the time of the sale, and the consolidated amount of the loans in existence at the time of

the FVO lien exceeded that amount, the amount was a renewal.

[3] We do not agree with FVO that the court pushed the envelope of the renewal rule in these respects. Indeed, the renewal rule is not implicated at all with respect to the "consolidation" of the June 1988 and September 1990 mortgages. Both were on the books and reflected on the abstract of title when FVO undertook its work on the vessel. It does not make any difference whether they are given priority from 1988 or 1990, as in either case both mortgages were recorded before FVO's lien was perfected.

[4] Nor do we believe FVO's contention that the district court, relying on the renewal doctrine, improperly invented

3418 "partial priority" of a mortgage. Rather, the court granted the Bank priority only to the extent of the balance of the $745,144.77 outstanding when FVO perfected its lien, and found that this did not leave FVO in a worse position since this amount exceeded total sale proceeds. The district court's ruling fully comports with the decisions in Barnouw and The T.E. Welles, which granted priority to the mortgagee "only to the extent of the original debt remaining at the time of the subsequent renewal." Barnouw, 304 F.2d at 722 n.5. As the court in Barnouw reasoned, to this extent, a renewal mortgage extends no new credit at all.

FVO also argues that whether one looks at the original principal balance of the September 1988 note, the remaining principal balance on that note as of July 1991, or the $300,000 note and mortgage, neither the July 1991 mortgage for $1,400,000 nor the 1994 mortgages on the PENGWIN and

the ISAFJORD for $2,800,000 can be a renewal mortgage because neither is "substantially the same" as the original debt. FVO also suggests that it is improbable that the $735,000 note was "renewed" by a $300,000 note that, in turn, was "renewed" by a $1,400,000 note, and later by notes totaling $2,800,000. Furthermore, it contends that if a mortgagee is allowed to consolidate separate mortgages and to secure debt greater than the original mortgage, intervening lien claimants such as itself will be prejudiced because debt service obligations are different with a larger loan, the likelihood of foreclosure is increased, and the prior debt may not be paid down (or payments credited) in the same way as it was before the restructuring. Therefore, FVO submits, since "[r]elief [pursuant to the mortgage renewal rule] will be denied if an intervening party relied on the satisfaction or if recognition of the priority of the renewal mortgage will place the intervening party in a position inferior (e.g., because the renewal mortgage secures a sum greater than the original mortgage) to that which he would have occupied if the mortgage had not been renewed," Avondale Shipyards, 754 F.2d

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at 1310, we should not allow the Bank's new mortgages to relate back to earlier mortgages.

[5] While these points have force and might well lead to a different result in a different case, we do not see how they can make any difference in this case since the outstanding principal amount of the June 1988 and September 1990 mortgages substantially exceeded the proceeds from the sale of the vessel.5 Whatever the import of increasing the debt or changing the payout, the fact remains that the old debt was still unpaid and, like the lien claimants in Southern Reef

Fisheries, 786 F.2d at 1525, Barnouw, 304 F.2d at 723, and CIT Corp. v. M/V Winchester, 643 F.Supp. 1059, 1064 (E.D. Va. 1986), FVO would not have had priority in these proceeds in any event.

[6] The Bank's evidence shows that it was owed $745,144.77 on June 19, 1991, representing the balance remaining on the notes secured by the June 1988 and September 1990 mortgages. It also shows that the new debt of $1.4 million secured by the July 10, 1991 mortgage was a renewal of the old debt and a further extension of credit to the PENGWIN. FVO did not controvert this evidence, except to say that the Liens Affidavit for the July 1991 mortgage executed by the PENGWIN's owner mentions the 1988 and 1990 mortgages, whereas later mortgages do not. However, these documents are insufficient to overcome the presumption that the new mortgage was intended as a renewal of the old mortgages, and the continuance of the same security. To the contrary, the presumption in this case is strengthened because the June 1988 and September 1990 mortgages were never discharged, nor was the lien on the unpaid balance ever extin-

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5 While FVO argues that the outstanding balance should not have been as high, and that it would have been zeroed out by the time of foreclosure if the June 1988 and September 1990 notes had been paid down in accordance with their terms, and if post-July 1991 payments had been credited to pre-July 1991 debt, it adduced no evidence raising a triable issue about the Bank's calculation of the outstanding balance, nor did it request additional discovery to pursue this point.

guished. Even if FVO were correct that the renewal rule should not apply, the 1988 and 1990 mortgages would still be outstanding and the debt would still be unpaid. Either way, its position would be precisely the same. Since other courts preserve the priority of an earlier mortgage even when a formal satisfaction has been filed for the initial mortgage, a fortiori priority should be presumptively preserved to the extent of the outstanding balance when the earlier mortgage has not been discharged.

[7] Nor are we persuaded otherwise by FVO's argument that the increase in debt from $735,000 to $2,800,000 strongly suggests that there was insufficient equity and capital to cover the obligations imposed on the vessel, thereby tilting the paramount equities in its favor. There simply is nothing in the record compelling such a conclusion. FVO's further contention that the loan immediately prior to its lien was for only $300,000, and thus the court should not have granted priority on the ground that the amount of the Bank's bid at the sale was less than the amount owed at the time FVO's lien was in place, fails as well. Both the June 1988 mortgage for $735,000 and the September 20, 1990 mortgage for $300,000 were in existence prior to the FVO lien, as FVO well knew from the vessel's abstract, and neither was extinguished. In addition, FVO suggests that no amount in excess of $300,000 could be a renewal because the September 1990 note on its face indicates that the borrower is not entitled to further advances once the total amount of principal has been advanced. However, the September 1990 loan was a straight line of credit, and the limitation was for further advances on that line of credit. Nothing in that note controverts the Bank's intent to renew, or prevents the Bank from restructuring or rearranging outstanding debt, or from extending further debt in a different

form.

[8] Finally, FVO argues that the district court's ruling consolidating all loans will adversely affect the fishing industry. First, it states that while in the normal course of business, if

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a shipyard determines from a vessel abstract that the amount of indebtedness is less than the equity in the vessel, it will deem the vessel credit worthy, under the district court's doctrine of consolidation of all loans, it will be difficult for a shipyard to know whether or not to extend credit because it will be unable to tell how much is outstanding and what mortgage dates truly apply. However, FVO knew exactly how much credit was outstanding and on which mortgages; all that it did not know was when or how those debts would be paid or what additional credit would be extended in the future or by whom. That level of uncertainty is inherent in the system. As Avondale Shipyards points out, a lienor acquiring a lien on property already encumbered by a mortgage "does so subject to the possibility, because of rearrangements or renewals of the indebtedness, that the lien of the mortgage may be extended beyond the original maturity date or that the terms of the indebtedness may otherwise change." Avondale Shipyards, 754 F.2d at 1308. We do not see how recognizing the priority of undischarged debt to the extent of the outstanding balance at the time the necessaries lien arises affects the equation. Second, FVO submits that the notion of partial priority is impractical and also harmful to the fishing industry. This stems from its view that the district court assumed FVO could have bid at the sale and protected its equity, and that it allowed partial priority based on the amount

bid at the auction compared to the amount owed on all loans at the time of the initial lien. However, that is not what the district court did; it found that FVO's position was not hurt because, as it turned out in this case, the vessel was sold for less than the outstanding balance on the senior debt.

In sum, the Bank's June 1988 and September 1990 mortgages were not extinguished, both mortgages had an outstanding balance, the Bank was given priority only to the extent of the original debt remaining when FVO's lien arose, and the former debt continued unpaid in an amount greater than the proceeds from sale of the vessel. Under none of the scenarios asserted by FVO would its claim have been paid. In light of

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these circumstances, to hold that the unpaid balance did not carry forward would run counter to the tenor of the ship mortgage laws, enacted to assure security to those supplying essential financing to the shipping industry, and to common sense since a ruling in favor of FVO would imply that the Bank purposefully relinquished its preferred status from the earlier mortgages in exchange for nothing more than a junior security. For these reasons, we cannot say that the district court erred in granting priority to the senior mortgages to the extent of the balance outstanding at the time FVO's lien was perfected.

III

FVO argues that it should have been allowed to complete discovery to respond to the Bank's motion for summary judgment. Although it filed no Federal Rule of Civil Procedure

56(f) affidavit, and did not move for a continuance pursuant to Rule 56(f), FVO did indicate that discovery was incomplete in its opposition to the Bank's motion. After filing its opposition on September 5, 1997, FVO filed a motion to compel on September 11. Based on the fact that FVO knew about the issues on which further discovery was sought, and knew as early as May that the Bank was refusing to produce the documents requested and to provide discovery, the district court found that the situation did not fall within the purview of Rule 56(f). We review the district court's decision for an abuse of discretion, see Margolis v Ryan, 140 F.3d 850, 853 (9th Cir. 1998), and we will only find an abuse of discretion if the movant diligently pursued its previous discovery opportunities, and can demonstrate that allowing additional discovery would have precluded summary judgment. See Byrd v. Guess, 137 F.3d 1126, 1135 (9th Cir.), cert. denied sub nom. Byrd v. Cantu, _____ U.S. _____, 119 S. Ct. 405 (1998).

[9] The district court did not abuse its discretion here, for several reasons. In addition to FVO's delay in compelling discovery, see, e.g., Brae Transp., Inc. v. Coopers & Lybrand,

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790 F.2d 1439, 1443 (9th Cir. 1986) (finding no abuse of discretion in the district court's refusal to allow discovery before summary judgment where the movant took no discovery for four months after issue of shareholder complicity in accounting fraud had arisen), FVO failed to move for a continuance, see Beneficial Standard Life Ins. Co. v. Madariaga , 851 F.2d 271, 277 (9th Cir. 1988), and did not submit affidavits that indicated "why [it could not] then present facts essential to justify [its] opposition to summary

judgment. " Carpenter v. Universal Star Shipping, S.A., 924 F.2d 1539, 1547 (9th Cir. 1991); see also Fed. R. Civ. P. 56(f) (requiring affidavits from the party opposing the summary judgment motion). Nor did its motion to compel indicate how the information sought would preclude summary judgment. See Garrett v. City & County of San Francisco, 818 F.2d 1515, 1518-19 (9th Cir. 1987). FVO sought the production of surveys regarding the value of the vessel, agreements between the PENGWIN's owner and the Bank, and a document which purported to preclude the owner from helping other creditors establish the respective priorities of their liens or ascertain the value of the vessel. As such, the discovery FVO wished to complete had to do with valuation of the vessel, an issue already decided, not with priority, which was the subject of the summary judgment.6 As further discovery of this nature would not have affected the summary judgment ruling, the court was not obliged to allow it.

IV

[10] FVO contends that the district court erred in confirming the sale of the PENGWIN and its fishing rights because

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6 FVO states that discovery may have revealed an agreement requiring the PENGWIN's owner to assist the Bank in defeating creditor claims and surveys in the possession of the Bank demonstrating that its bid was grossly inadequate, giving rise to a claim of equitable subordination. However, FVO produced no evidence, cited no authority, and offered no explanation in support of an equitable subordination claim.

review a district court's order confirming a U.S. Marshal's sale for an abuse of discretion. See Ghezzi v. Foss Launch & Tug Co., 321 F.2d 421, 425 (9th Cir. 1963). A sale may be set aside on a showing of (1) fraud on the part of the purchaser, the officer conducting the sale, or any other person connected with the sale; (2) collusion; or (3) inadequacy of price, provided the inadequacy is gross and is such as amounts to either fraud or unfairness. See id.

As a preliminary matter, the Bank contends that we lack jurisdiction to consider this issue since FVO failed to move for a stay of execution or file a supersedeas bond before the vessel left control of the district court. However, continuous control of the res is not required in order for the district court or this court to retain jurisdiction. See Republic Nat'l Bank v. United States, 506 U.S. 80, 93 (1992) ("No settled rule requires continuous control of the res for appellate jurisdiction in an in rem forfeiture proceeding."); see also Stevedoring Servs. v. Ancora Transp., N.V., 59 F.3d 879, 882 (9th Cir. 1995) (noting that "[w]hile a district court needs jurisdiction over a res to initiate an in rem action, it does not need to maintain continuous control of the res to maintain jurisdiction of the action," and reading Republic National Bank as eliminating any requirement that a party seeking to institute a maritime attachment obtain a stay or post a supersedeas bond in order to preserve the district court's jurisdiction over garnished funds while the party appeals the release of the funds).

On the merits, FVO contends that the PENGWIN was sold for an amount significantly below its market value. Based on an October 1991 valuation, FVO claims that the PENGWIN had an estimated market value of $3,500,000, not including the value of the fishing permits, and that based on the declaration

of Kinda Kozak, a fishery consultant, the fishing rights were worth $650,000 to $900,000 in May 1997, the time of the foreclosure sale. It also points to evidence that the Bank had offered to sell the PENGWIN and another vessel for

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$3,000,000 approximately one year prior to the U.S. Marshal's sale.

[11] We are not firmly convinced of error. While there is evidence that the vessel was worth $3,500,000 in 1991, and that the Bank was willing to sell it and a second vessel for $3,000,000, the court was within its discretion to find that the auction price was adequate. Two days after the foreclosure sale, the President of FVO estimated the value of the vessel, including its fishing rights, to be $825,000. Given that the vessel was sold at foreclosure, this is not a gross disparity. See BFP v. Resolution Trust Corp., 511 U.S. 531, 537-38 (1994) (observing that the market value of a piece of property is not the price expected to be obtained in the foreclosure context). Finally, as the district court found, there was no evidence that a higher upset bid had been made or was likely to be made in the event of resale. Thus, we cannot conclude that the court erred in failing to set aside the sale.

[12] FVO also maintains that the Bank is not entitled to confirmation of its bid since the sale was unfairly conducted to the detriment of other creditors and the debtor. First, it points to the failure to give general notice that the fishing rights were being sold. However, as the district court observed, notice of inclusion of fishing rights is not required under the rules and, in any event, no evidence was adduced that the PENGWIN

would have sold for a higher price had the fishing rights been included in the notice. See Ghezzi, 321 F.2d at 425.

[13] Next, FVO argues that by giving the wrong location of the vessel and failing to mention the fishing rights, the form of the notice violated due process. Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). "It is reasonable to presume that a party with an

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interest in a vessel will keep itself apprised of events concerning that vessel." DiGiovanni v. Kjessler, 101 F.3d 76, 78 (9th Cir. 1996). As the district court found, FVO produced no evidence that either the debtor or any creditor was prejudiced by the Bank's actions, or that anyone would have made a higher bid if fishing rights had been mentioned in the notice or if the vessel's location had been correctly stated. Instead, the record shows that a good number of potential buyers were informed of the inclusion of fishing rights and actually attended the sale. While the notice misplaced the vessel's location by 100 feet, the vessel had been berthed where the sale took place for months. As a result, we cannot say that the court erred in concluding that the notice was reasonably calculated to apprise potential buyers of the pending action.

AFFIRMED.

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B. OTHER OPINIONS, ORDERS, FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

October 21, 1997
At Seattle
Clerk U.S. District Court
Western District of
Washington

BANK OF AMERICA NW, N.A., dba SEAFIRST BANK,	)	
Plaintiff,	)	CASE No. C96-1305C
v.	)	
	)	ORDER
PENGWIN, Official No. 586183, PENGWIN, INC., KONRAD S. URI and I. HELEN URI,	)	
Defendants.	)	

I. Introduction

This is an action to recover various maritime liens against the vessel PENGWIN (sic). The vessel and its fishing rights were sold at a marshal's auction on May 7, 1997 for

$575,000.[1] The Court confirmed that sale on May 29, 1997. On July 16, 1997, the Court ordered the Bank of America NT&SA (formerly Bank of America N.W., N.A. and Seattle-First National Bank), d/b/a Seafirst Bank (Bank) had established lien priority over J.M. Martinac Shipbuilding Corporation and Sullivan & Curtis Insurance Brokers of Washington, Inc. Shortly thereafter, the Court dismissed J.M. Martinac Shipbuilding Corporation and Sullivan & Curtis Insurance Brokers of Washington, Inc.

This matter is presently before the Court on the Bank's Motion for Summary Judgment. The Bank moves on the grounds that its lien has priority over FVO's lien. Neither party requested oral argument.

II. Facts

In June 1988, the Bank recorded a mortgage against the PENGWIN (sic) for $735,000. In September 1990, the Bank recorded a mortgage against the PENGWIN (sic) for $350,000. In June 1991, FVO completed work on the PENGWIN (sic), giving rise to a $148,000 lien. In July 1991, the Bank recorded a $1,400,000 mortgage against the PENGWIN (sic). After July 1991, the Bank requested a series of mortgages, ultimately recording a $2,800,000 mortgage in 1994. The series of notes from July 1991 to 1994 state that

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[1] The Court notes in its July 16, 1997, Order at page 4: "The Court cautions that its Order granting the Bank a mortgage in the fishing rights should not be viewed without careful consideration of the posture of the case. The Court reiterates that the Bank's motion was granted primarily, if not solely, due to the lack of opposition."

they are renewals and replacements of previous mortgages. The June 1988, September 1990, and June 1991 mortgages do not state whether they are renewals or not. In addition, a document entitled "Prior and Subsequent Liens Affidavit" was filed in conjunction with the July 1991 mortgage. That document listed the June 1988 and September 1990 mortgages as prior liens.

III. Discussion

Absent a clear indication of contrary intent, execution and delivery of a new mortgage in renewal of a former one does not extinguish priority of the former one. Southern Reef Fisheries v. O/S BROADFIRE LEADER, 786 F.2d 1523, 1524 (11th Cir. 1986). This rule has equal effect when the principal on the mortgage is subsequently increased. Id. at 1424-25. As long as a portion of the principal debt remains, there is a presumption that the new mortgage is a renewal, and regards the same security. Id at 1525. However, this rule only applies to the amount of the remaining debt at the time of renewal. Merchants and Marine Bank v. T.E. WELLES, 289 F.2d 188, 194 (5th Cir. 1961).

The Bank argues that in May 1991 it had a lien for $745,144.77, an amount in excess of the sale proceeds, for the remainder of the June 1988 and September 1990 mortgages. The Bank goes on to argue that the mortgages from July 1991 to 1994 were renewals, and therefore maintained the Bank's lien priority. Thus, if the July 1991 lien was a renewal then the priority was maintained; or, alternatively, if the July 1991 lien was a new mortgage, then the prior liens still exist, and have priority over FVO's lien. The Bank has submitted the declaration of James H. Michaels as evidence that the lien on

the June 1998 (sic) and September 1990 mortgages has never been less than $745,144.77.

FVO argues that the Bank must establish a trail of refinances from 1998 (sic) to 1994. FVO goes on to argue that the July 1991 mortgage was new, and therefore destroyed the Bank's priority on the June 1988 and September 1990 mortgages. However, FVO's position overlooks the prior liens. In order for FVO to gain priority over the remaining $745,144.77 of the initial lien, that lien must have been extinguished. FVO does not argue that it has been extinguished, nor does FVO provide any evidence of it. FVO also states that the June 1988 and September 1990 liens are separate mortgages and that the remainder on each of those mortgages is less than the amount of the vessel proceeds. However, assuming they are separate liens, FVO has not provided any evidence that separating the liens would affect their total value.

FVO argues that all of the cases that discuss the renewal mortgage rule note that the junior lienor was left in substantially the same position as if the mortgage had not been renewed. FVO states that in this case the debt was increased to $1,400,000 in July 1991. Consequently, FVO believes that it would be left in a worse position if the Court applied the renewal mortgage rule. However, the amount of the Bank's lien in June 1991, when FVO perfected its lien, exceeded the total of the sale proceeds. Consequently, FVO will not be left in a worse position.

Finally, FVO argues that summary judgment should be denied until FVO can complete its discovery. Fed. R. Civ. P. 56(f) requires that summary judgment be denied when it

appears that the opposing party has not been given an opportunity to discover information essential to defeat the motion. Anderson v. Liberty, Inc., 106 S. Ct. 2505, 2511 n.5 (1986). FVO has had many months to discover these issues. It first raised them in May 1997, when briefing its objections to the vessel sale. As a result, this situation does not come within Rule 56(f).

IV. Conclusion

In accordance with the foregoing analysis, summary judgment is GRANTED in favor of the Bank. Further, because there does not appear to be any issues remaining in the action, FVO's Motion to Compel Answers to Deposition Questions and Production of Documents is DENIED as moot.

SO ORDERED this 21 day of October 1997.

/s

UNITED STATES DISTRICT JUDGE

C. STATUTES, ORDINANCES AND REGULATIONS

46 U.S.C. § 31321. Filing, recording, and discharge

(a)

(1) A bill of sale, conveyance, mortgage, assignment, or related instrument, whenever made, that includes any part of a documented vessel or a vessel for which an application for documentation is filed, must be filed with the Secretary of Transportation to be valid, to the extent the vessel is involved, against any person except -

(A) the grantor, mortgagor, or assignor;

(B) the heir or devisee of the grantor, mortgagor, or assignor; and

(C) a person having actual notice of the sale, conveyance, mortgage, assignment, or related instrument.

(2) Each bill of sale, conveyance, mortgage, assignment, or related instrument that is filed in substantial compliance with this section is valid against any person from the time it is filed with the Secretary.

(3) The parties to an instrument or an application for documentation shall use diligence to ensure that the parts of the instrument or application for which they are responsible are in substantial compliance with the filing and documentation requirements.

(4) (A) A bill of sale, conveyance, mortgage, assignment, or related instrument may be filed electronically under regulations prescribed by the Secretary.

(B) A filing made electronically under subparagraph (A) shall not be effective after the 10-day period beginning on the date of the filing unless the original instrument is provided to the Secretary within that 10-day period.

(b) To be filed, a bill of sale, conveyance, mortgage, assignment, or related instrument must -

(1) identify the vessel;

(2) state the name and address of each party to the instrument;

(3) state, if a mortgage, the amount of the direct or contingent obligations (in one or more units of account as agreed to by the parties) that is or may become secured by the mortgage, excluding interest, expenses, and fees;

(4) state the interest of the grantor, mortgagor, or assignor in the vessel;

(5) state the interest sold, conveyed, mortgaged, or assigned; and

(6) be signed and acknowledged.

(c) If a bill of sale, conveyance, mortgage, assignment, or related document is filed that involves a vessel for which an application for documentation is filed, and the Secretary decides that the vessel cannot be documented by an applicant -

(1) the Secretary shall send notice of the Secretary's decision, including reasons for the decision, to each interested party to the instrument filed for recording; and

(2) 90 days after sending the notice as provided under clause (1) of this subsection, the Secretary -

(A) may terminate the filing; and

(B) may return the instrument filed without recording it under subsection (e) of this section.

(d) A person may withdraw an application for documentation of a vessel for which a mortgage has been filed under this section only if the mortgagee consents.

(e) The Secretary shall -

(1) record the bills of sale, conveyances, mortgages, assignments, and related instruments of a documented vessel

complying with subsection (b) of this section in the order they are filed; and

(2) maintain appropriate indexes, for use by the public, of instruments filed or recorded, or both.

(f) On full and final discharge of the indebtedness under a mortgage recorded under subsection (e)(1) of this section, a mortgagee, on request of the Secretary or mortgagor, shall provide the Secretary with an acknowledged certificate of discharge of the indebtedness in a form prescribed by the Secretary. The Secretary shall record the certificate.

(g) The mortgage or related instrument of a vessel covered by a preferred mortgage under section 31322(d) of this title, that is later filed under this section at the time an application for documentation is filed, is valid under this section from the time the mortgage or instrument representing financing became a preferred mortgage under section 31322(d).

(h) On full and final discharge of the indebtedness under a mortgage deemed to be a preferred mortgage under section 31322(d) of this title, a mortgagee on request of the Secretary, a State, or mortgagor, shall provide the Secretary or the State, as appropriate, with an acknowledged certificate discharge of the indebtedness in a form prescribed by the Secretary or the State, as applicable. If filed with the Secretary, the Secretary shall enter that information in the vessel identification system under chapter 125 of this title.

46 U.S.C. § 31322. Preferred mortgages

(a) A preferred mortgage is a mortgage, whenever made, that -

(1) includes the whole of the vessel;

(2) is filed in substantial compliance with section 31321 of this title; and

(3) (A) covers a documented vessel; or

(B) covers a vessel for which an application for documentation is filed that is in substantial compliance with the requirements of chapter 121 of this title and the regulations prescribed under that chapter.

(b) A preferred mortgage filed or recorded under this chapter may have any rate of interest that the parties to the mortgage agree to.

(c) (1) If a preferred mortgage includes more than one vessel or property that is not a vessel, the mortgage may provide for the separate discharge of each vessel and all property not a vessel by the payment of a part of the mortgage indebtedness.

(2) If a vessel covered by a preferred mortgage that includes more than one vessel or property that is not a vessel is to be sold on the order of a district court in a civil action in rem, and the mortgage does not provide for separate discharge as provided under paragraph (1) of this subsection -

(A) the mortgage constitutes a lien on that vessel in the full amount of the outstanding mortgage indebtedness; and

(B) an allocation of mortgage indebtedness for purposes of separate discharge may not be made among the vessel and other property covered by the mortgage.

(d) (1) A mortgage or instrument granting a security interest perfected under State law covering the whole of a vessel titled in a State is deemed to be a preferred mortgage if -

(A) the Secretary certifies that the State titling system complies with the Secretary's guidelines for a titling system under section 13106(b)(8) of this title; and

(B) information on the vessel covered by the mortgage or instrument is made available to the Secretary under chapter 125 of this title.

(2) This subsection applies to mortgages or instruments covering vessels titled in a State after -

(A) the Secretary's certification under paragraph (1)(A) of this subsection; and

(B) the State begins making information available to the Secretary under chapter 125 of this title.

(3) A preferred mortgage under this subsection continues to be a preferred mortgage if the vessel is no longer titled in the State where the mortgage was made.

(e) If a vessel is already covered by a preferred mortgage when an application for titling or documentation is filed -

(1) the status of the preferred mortgage covering the vessel to be titled in the State is determined by the law of the jurisdiction where the vessel is currently titled or documented; and

(2) the status of the preferred mortgage covering the vessel to be documented under chapter 121 is determined by subsection (a) of this section.

46 U.S.C. § 31325. Preferred mortgage liens and enforcement

(a) A preferred mortgage is a lien on the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by the vessel.

(b) On default of any term of the preferred mortgage, the mortgagee may -

(1) enforce the preferred mortgage lien in a civil action in rem for a documented vessel, a vessel to be documented under chapter 121 of this title, or a foreign vessel;

(2) enforce a claim for the outstanding indebtedness secured by the mortgaged vessel in -

(A) a civil action in personam in admiralty against

the mortgagor, maker, comaker, or guarantor for the amount of the outstanding indebtedness or any deficiency in full payment of that indebtedness; and

(B) a civil action against the mortgagor, maker, comaker, or guarantor for the amount of the outstanding indebtedness or any deficiency in full payment of that indebtedness; and

(3) enforce the preferred mortgage lien or a claim for the outstanding indebtedness secured by the mortgaged vessel, or both, by exercising any other remedy (including an extrajudicial remedy) against a documented vessel, a vessel for which an application for documentation is filed under chapter 121 of this title, a foreign vessel, or a mortgagor, maker, comaker, or guarantor for the amount of the outstanding indebtedness or any deficiency in full payment of that indebtedness, if -

(A) the remedy is allowed under applicable law; and

(B) the exercise of the remedy will not result in a violation of section 9 or 37 of the Shipping Act, 1916 (46 App. U.S.C. 808, 835).

(c) The district courts have original jurisdiction of a civil action brought under subsection (b)(1) or (2) of this section. However, for a documented vessel, a vessel to be documented under chapter 121 of this title, or a foreign vessel, this jurisdiction is exclusive of the courts of the States for a civil action brought under subsection (b)(1) of this section.

(d) (1) Actual notice of a civil action brought under subsection (b)(1) of this section, or to enforce a maritime lien, must be given in the manner directed by the court to -

(A) the master or individual in charge of the vessel;

(B) any person that recorded under section 31343(a) or (d) of this title a notice of a claim of an undischarged lien on the vessel; and

(C) a mortgagee of a mortgage filed or recorded under section 31321 of this title that is an undischarged mortgage on the vessel.

(2) Notice under paragraph (1) of this subsection is not required if, after search satisfactory to the court, the person entitled to the notice has not been found in the United States.

(3) Failure to give notice required by this subsection does not affect the jurisdiction of the court in which the civil action is brought. However, unless notice is not required under paragraph (2) of this subsection, the party required to give notice is liable to the person not notified for damages in the amount of that person's interest in the vessel terminated by the action brought under subsection (b)(1) of this section. A civil action may be brought to recover the amount of the terminated interest. The district courts have original jurisdiction of the action, regardless of the amount in controversy or the citizenship of the parties. If the plaintiff prevails, the court may award costs and attorney fees to the plaintiff.

(e) In a civil action brought under subsection (b)(1) of this section -

(1) the court may appoint a receiver and authorize the receiver to operate the mortgaged vessel and shall retain in rem jurisdiction over the vessel even if the receiver operates the vessel outside the district in which the court is located; and

(2) when directed by the court, a United States marshal may take possession of a mortgaged vessel even if the vessel is in the possession or under the control of a person claiming a possessory common law lien.

(f) (1) Before title to the documented vessel or vessel for which an application for documentation is filed under chapter 121 is transferred by an extrajudicial remedy, the person

exercising the remedy shall give notice of the proposed transfer to the Secretary, to the mortgagee of any mortgage on the vessel filed in substantial compliance with section 31321 of this title before notice of the proposed transfer is given tothe Secretary, and to any person that recorded a notice of a claim of an undischarged lien on the vessel under section 31343(a) or (d) of this title before notice of the proposed transfer is given to the Secretary.

(2) Failure to give notice as required by this subsection shall not affect the transfer of title to a vessel. However, the rights of any holder of a maritime lien or a preferred mortgage on the vessel shall not be affected by a transfer of title by an extrajudicial remedy exercised under this section, regardless of whether notice is required by this subsection or given.

(3) The Secretary shall prescribe regulations establishing the time and manner for providing notice under this subsection.

46 U.S.C. § 31326. Court sales to enforce preferred mortgage liens and maritime liens and priority of claims

(a) When a vessel is sold by order of a district court in a civil action in rem brought to enforce a preferred mortgage lien or a maritime lien, any claim in the vessel existing on the date of sale is terminated, including a possessory common law lien of which a person is deprived under section 31325(e)(2) of this title, and the vessel is sold free of all those claims.

(b) Each of the claims terminated under subsection (a) of this section attaches, in the same amount and in accordance with their priorities to the proceeds of the sale, except that -

(1) the preferred mortgage lien, including a preferred mortgage lien on a foreign vessel whose mortgage has been guaranteed under title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1101 et seq.) [1] has priority over all claims against the vessel (except for expenses and fees allowed by the court, costs imposed by the court, and preferred maritime liens); and

(2) for a foreign vessel whose mortgage has not been guaranteed under title XI of that Act, the preferred mortgage lien is subordinate to a maritime lien for necessaries provided in the United States.

46 U.S.C. § 31342. Establishing maritime liens

(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner -

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

46 U.S.C. § 31343. Recording and discharging liens on preferred mortgage vessels

(a) Except as provided under subsection (d) of this section, a person claiming a lien on a vessel covered by a preferred mortgage filed or recorded under this chapter may record with the Secretary of Transportation a notice

of that person's lien claim on the vessel. To be recordable, the notice must -

(1) state the nature of the lien;

(2) state the date the lien was established;
(3) state the amount of the lien;
(4) state the name and address of the person; and
(5) be signed and acknowledged.

(b) The Secretary shall record a notice complying with subsection (a) of this section.

(c) On full and final discharge of the indebtedness that is the basis for a claim recorded under subsection (b) of this section, on request of the Secretary or owner, the person having the claim shall provide the Secretary with an acknowledged certificate of discharge of the indebtedness. The Secretary shall record the certificate.

(d) A person claiming a lien on a vessel covered by a preferred mortgage under section 31322(d) of this title must record and discharge the lien as provided by the law of the State in which the vessel is titled.

Supreme Court, U.S.
FILED
AUG 9 1999
OFFICE OF THE CLERK

(3)

NO. 99-78

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

FISHING VESSEL OWNERS & MARINE WAYS, INC.,

Petitioner,

v.

BANK OF AMERICA, NT & SA, formerly Seattle-First National Bank, fdba Seattle First National Bank aka Seafirst Bank,

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Bank of America, NT&SA, formerly Seattle-First National Bank, fdba Seattle First National Bank, aka Seafirst Bank (Plaintiff and Appellee below. Bank of America is a publicly traded entity)

Fishing Vessel Owners Marine Ways Inc. (Intervenor Appellant below. Fishing Vessel Owners Marine Ways Inc. is a closely held Washington Corporation with no parent companies, subsidiaries, or affiliates that have issued shares to the public)

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I. STATEMENT OF THE CASE

This case arises out of a vessel arrest and foreclosure. The vessel PENGWIN, Official No. 586 183 ("Vessel") was arrested by Seattle First-National Bank, d/b/a Seafirst Bank ("Bank"). Fishing Vessel Owners and Marine Ways, Inc. ("FVO") intervened, claiming a necessaries lien for the unpaid balance due for labor, parts and materials. The Bank's claim was to foreclose its mortgages on the Vessel, while FVO sought to foreclose a lien for necessaries.

The Bank first placed a mortgage on the Vessel for $735,000 on June 23, 1988. The Bank placed a second mortgage on the Vessel for $300,000 on September 20, 1990. FVO's lien arose on June 26, 1991. The unpaid balance on FVO's debt is $175,208.85.

On June 19, 1991, a week before FVO's lien arose, the Vessel owner signed a renewal and replacement note for $1,400,000. Unfortunately, the mortgage was not recorded until July 10, 1991, two weeks after FVO's lien arose. The mortgage was increased to $1,900,000 in December, 1991, then reduced to $1,733,000 in October, 1994. Another mortgage of $1,150,000 was recorded thereafter to cross-collateralize the debt of another company.[1]

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[1] FVO misstates the facts when it alleges that the Bank "affirms [the vessel] is only worth $575,000." Pet. 21. This was the auction price of the Vessel. FVO argues that the Vessel was undercapitalized and that the Courts below erroneously analyzed the evidence regarding the nature

The $1,400,000 mortgage of July 10, 1991, in addition to extending further credit to the Vessel owner, was intended to renew and replace the two earlier mortgages of $725,000 and $300,000, as were the subsequent mortgages of $1,900,000 and $1,733,000.

The $735,000 and $300,000 mortgages, both recorded well before FVO's lien, were paid down to $745,144.77. This was their lowest balance at any time.

The Vessel was sold by the U.S. Marshal on May 7, 1997, and the District Court confirmed the sale. Because the sale brought only $575,000, less than the Bank's debt of $745,144.77 under its two prior mortgages, the Bank sought summary judgment to establish the priority of its claim over FVO. The District Court granted the Bank's motion for summary judgment, establishing the Bank's priority. On appeal, the Ninth Circuit affirmed.[2]

The courts below acknowledged and enforced the general rule that in the absence of a clear indication of contrary intent, execution of a new mortgage in renewal of a former one does not extinguish priority of the former one. App. B; App. A,

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and amount of the debt and the Bank's intentions. Pet. 21-25. These are factual issues, not normally reviewable here. NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 503 (1951).

[2] FVO misstates the facts when it contends that the Bank prepared the Vessel owners' affidavits regarding prior and subsequent liens. Pet. 6. They were prepared by a commercial documentation service and, most importantly, signed by the Vessel owner, not the Bank.

p. 6. This general rule is referred to as the mortgage renewal rule ("Renewal Rule").

Application of the Renewal Rule in this case did not prejudice FVO. As stated above, the Bank's debt at the time FVO's lien claim arose, which was carried forward to the latest incarnation of the mortgages, exceeded the proceeds generated by the sale of the Vessel. Before the first two mortgages were consolidated and subsequently renewed, FVO was a junior lien claimant in the amount of $745,144.77. The debt in question was carried forward in every renewal note and mortgage.

II. REASONS FOR DENYING THE WRIT

A. The Petition Should be Denied Because the Opinion Below Does not Conflict with the Settled Law of the Circuits and Because Minor Developments in the Renewal Rule are not of Significant Public Importance.

1. The Opinion Below Does Not Conflict with the Settled Law of the Circuits. In this case, the Ninth Circuit applied the mortgage Renewal Rule as developed in the Fifth and Eleventh Circuits and found that the Bank's subsequent mortgages on the PENGWIN retained the priority of the Bank's earlier preferred ship mortgages. App. A, p. 3. Insofar as the Petition asserts a conflict among the circuits, the Petition misstates the law.

All three circuits agree that when parties execute a new mortgage in renewal of a former one, the renewal does not have the effect of extinguishing the priority which the original

mortgage carries. Merchants & Marine Bank v. the T.E. WELLES, 289 F.2d 188 (5th Cir. 1961); Southern Reef Fisheries v. O/S BROADFIRE LEADER, 786 F.2d 1523 (11th Cir. 1986); and Bank of America v. PENGWIN, App. A, CV-97-36050 (9th Cir. 1999).[3]

Whether the execution of the subsequent note and mortgage is a renewal and replacement, preserving the priority of the previous obligation, or a new note and mortgage extinguishing the priority of the earlier debt is a matter of intent. So long as a portion of the initial debt remains, "the presumption ordinarily is that the new mortgage is intended as a renewal of the old, and the continuance of the same security." Barnouw v. S.S. OZARK, 304 F.2d 717, 723 (5th Cir. 1962). The District Court noted that the Bank submitted evidence of such intent. App. B, p. 27. See also App. A., p. 7.

The court in T.E. WELLES held that a subsequent mortgage was a renewal and replacement entitled to the same priority, even though the second mortgage contained an additional advance. 289 F.2d at 194. In that case, the original note secured by the ship mortgage was for $12,000.00 and as FVO points out, Pet. 19, the renewal note and mortgage was for $11,500.00. What FVO fails to mention is that prior to the execution of the renewal note, the principal had been reduced

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[3] This result was suggested as long ago as 1933 in The BERGEN, 64 F.2d 877, 880-1 (9th Cir. 1933).

to less than $8,000.00. Even though the renewal note contained an additional advance of $4,000.00, the court conferred priority status to the renewal mortgage. 289 F.2d at 194.

The court in Barnouw also held that subsequent mortgages were renewals and replacements even though the amount of the mortgage debt was increased. Barnouw, 304 F.2d at 722, 724. When addressing the issue of an increase in the face amount of the mortgage, the court in Barnouw relied in part on the fact that:

> Whatever the consequence of the increased debt, or the change in interest rate, it is uncontradicted that for an amount way in excess of the proceeds from the Marshal's sale of the vessel, the former debt continued unpaid.

Barnouw, 304 F.2d at 722. See also Southern Reef, 786 F.2d at 1524 (11th Cir. 1986).

Similarly, when the existing prior debt exceeded the proceeds from a Marshal's sale, an increase in the debt due on a mortgage was not held to preclude application of the renewal mortgage rule. CIT Corp. v. M/V WINCHESTER, 643 F. Supp. 1059, 1064 (E.D. Va. 1986).

Further, all three circuits agree, contrary to FVO's argument, that a mortgage need not be a mirror image of the prior mortgage which it purports to renew. If the intent of the

parties is to renew and replace a mortgage, it matters not that certain of the parties or terms have changed, or that the amount financed has been increased. The Ninth Circuit in this case has said that the Bank only retains priority on the amount outstanding at the time of renewal; this conservative application of the Renewal Rule does not conflict with the law of the other circuits.

FVO contends that the court below developed a new "partial priority" variation of the Renewal Rule which conflicts with the decisions of the Fifth and Eleventh Circuits. The Ninth Circuit court did not develop a new doctrine of partial priority. Petitioner again misstates the law as stated by the Ninth Circuit below. The circuits which have addressed the issue agree that the mortgagee extending additional credit retains the priority of the original mortgage(s), but only if the lien claimants are left in the same position they would have occupied had no renewal mortgages been executed. T.E. WELLES, 289 F.2d at 194, Barnouw, 304 F.2d at 723, and PENGWIN, App. A, p. 15. A lien Claimant is left in the same position as before renewal if the amount of debt accorded priority over the Claimant's lien remains unchanged. That is exactly what happened in the instant case. FVO was left in the same position after renewal. The unpaid Bank debt that had priority when FVO's lien arose was the same unpaid Bank debt that had priority when the vessel was arrested and sold. FVO

was not prejudiced by the application of the Renewal Rule because the Vessel did not bring a sufficiently high price at the Marshal sale to pay the Bank's priority claim.

A change in parties, terms, or even amount financed does not preclude a subsequent mortgage from qualifying as a renewal. See e.g. Avondale Shipyards v. TANK BARGE ETS 2303, 754 F.2d 1300 (5th Cir. 1985)(finding that a change in the mortgagor did not preclude application of the rule). FVO contends that the subsequent mortgage is not a renewal because for the subsequent mortgage was secured by another vessel in addition to the PENGWIN. The mere addition of collateral, even collateral owned in part by other parties, does not preclude application of the Renewal Rule. Id. The restructuring of the debt in this case is not atypical, and did not prejudice subsequent lienors. As in Avondale, a change in terms does not preclude renewal.

FVO argues that because the subsequent mortgage was not a mirror image of the prior mortgage it cannot be a renewal. This is not the proper test; what matters is that the Bank intended to preserve its mortgage priority, at least to the extent of the prior mortgage, and that the junior lien holders are not harmed. These principles were honored in this case. The Ninth Circuit correctly followed the Renewal Rule.

2. This Case Poses No Questions of Public Importance. Although matters of admiralty law are a special

concern of the federal courts, U.S. Const. Art. III, §2, the Renewal Rule is a relatively small part of maritime law. Well-settled in the Fifth Circuit for thirty-eight years in a decision that has been uniformly followed ever since by every court to consider the question, the rule need not be adjudicated by the Supreme Court. The rule as developed and applied by the courts provides certainty for all parties: the lenders can be certain of retaining their priority upon refinance, and the vessel suppliers can be certain of the amount of debt a vessel secures by looking at the abstract before extending credit.

Indeed, the Renewal Rule is widely cited and followed in the cases, digests and treatises. See, e.g., Maryland National Bank v. TWICE AS NICE, 1994 AMC 2062, 2070-2 (D. Del. 1993), Marine Mart, Inc. v. O/S MISS DARLA DAWN, 273 F. Supp. 353, 356 (S.D. Tex. 1967), First Fidelity Bank v. Bock, 279 N.J. Super. 172, 652 A.2d 262 (N.J. Sup. 1994), 2 Benedict on Admiralty, § 70g, p. 6-73 (1998), L. Schoenbaum, Admiralty and Maritime Law, § 9-6, p. 512 (2d ed. 1994), Gilmore and Black, The Law of Admiralty, pp. 723-4 (2nd ed. 1975), Michael A. DiSabatino, Annotation, What is 'A Preferred Maritime Lien' Under Ship Mortgage Act?, 42 ALR Fed. 540 (1979), 70 Am. Jur. 2d Shipping, § 182 (1987).

Although the rule is infrequently litigated, the maritime industry relies on the rule and the attendant certainty. This case presents no pressing constitutional or federalism issue. The

uniformity of the cases, their citation in support of the Renewal Rule, and their very paucity suggest there is no important interest that would benefit from adjudication by this Court.

B. Presumably Congress Was Aware of the Judicial Interpretation of the Ship Mortgage Laws and Intended to Adopt that Interpretation When it Recodified the Laws Without Substantive Changes.

FVO argues that the federal courts have judicially imported a doctrine of renewal which contradicts Congress' intent in enacting and revising the various ship mortgage laws. FVO explains that in 1988 Congress revised and recodified centuries worth of ship mortgage statutes, effective January 1, 1989. FVO points out that Congress intended no substantive change in lien law by this recodification. As the cases cited above demonstrate, by this time the Renewal Rule had been well developed by the courts.

Because Congress recodified the ship mortgage laws in 1989 without substantive changes, it is presumed that Congress was aware of the judicial interpretation of the ship mortgage laws and intended to adopt that interpretation when it reenacted the laws without change. Bragdon v. Abbott, 118 S.Ct. 2196, 141 L.Ed.2d 540, on remand 163 F.3d 87 (1998).

C. The Renewal Rule is Good For the Maritime Industry.

The Renewal Rule has been effectively governing the priority of preferred ship mortgages for thirty-eight years; it makes little sense to abandon a workable rule simply because it was developed by the courts rather than the Congress. Further, the Rule comports well with the ship mortgage laws in that both further investment in the shipping industry. T.E. WELLES, 289 F.2d at 193-194. The Renewal Rule furthers investment in vessels by ensuring that qualifying ship mortgages retain priority at least to the extent of the balance outstanding when the mortgage is replaced. The Renewal Rule allows a creditor to refinance a vessel without losing priority on the amount then outstanding. At the same time, by limiting priority to the amount of debt outstanding at the time of the refinance, the Rule protects subsequent creditors by limiting priority of the mortgage to the amount outstanding at the time of the renewal. Before extending credit, junior lienors can determine the amount of debt a vessel secures by reviewing the vessel abstract.

While infrequently litigated, the Rule has been consistently applied throughout the latter half of the Twentieth Century. The courts developed the Rule, recognizing that as a matter of public policy, the best thing for the maritime industry is to keep boats afloat, in good condition, and working at their

peak of performance so they can pay their debts. This policy is reflected in Congress' enactment of the Ship Mortgage Act. See Detroit Trust Co. v. The THOMAS BARLUM, 293 U.S. 21 (1934). If lenders cannot make subsequent loans to support the undertaking without jeopardizing their earlier advances, this policy would be hindered for no good reason. The refinance of vessel debts benefits suppliers such as FVO by keeping vessels in navigation, making it possible for the vessels to pay their debts.

In many cases, as here, vessel owners seek further credit to finance improvements on their vessels. Suppliers, such as FVO, directly benefit from the extension of credit. The best policy for mortgage priority is one that will keep the vessels working and producing income so that they can pay their debt to both the lenders and the suppliers. Thus, as a policy matter, the investment-fostering Renewal Rule is good for the maritime industry.

III. FVO'S CHALLENGE TO THE MORTGAGE RENEWAL RULE WAS NOT MADE BELOW

The Supreme Court should not consider FVO's challenge to the mortgage renewal rule because the argument has not been raised or resolved in the lower courts. FW/PBS, Inc. v. City of Dallas, 110 S.Ct. 596, 604, 493 U.S. 215, 224, 107 L.Ed.2d 603, 58 USLW 4079 (1990). In FW/PBS, Justice O'Connor explained that the Supreme Court generally does not

consider an argument unless it was raised below: "It is this court's practice to decline to review those issues neither pressed nor passed upon below." Id. 110 S.Ct. at 604, 493 U.S. at 224.

The only challenge to the Renewal Rule raised below was FVO's challenge to the District Court's application of the rule. FVO should not be able to now expand its list of alleged errors to include a challenge to what it describes as the "judicially imported" Renewal Rule.

IV. CONCLUSION

For the reasons given above, the petition should be denied.

Dated: August 9, 1999

Respectfully submitted,

/s/ _____
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